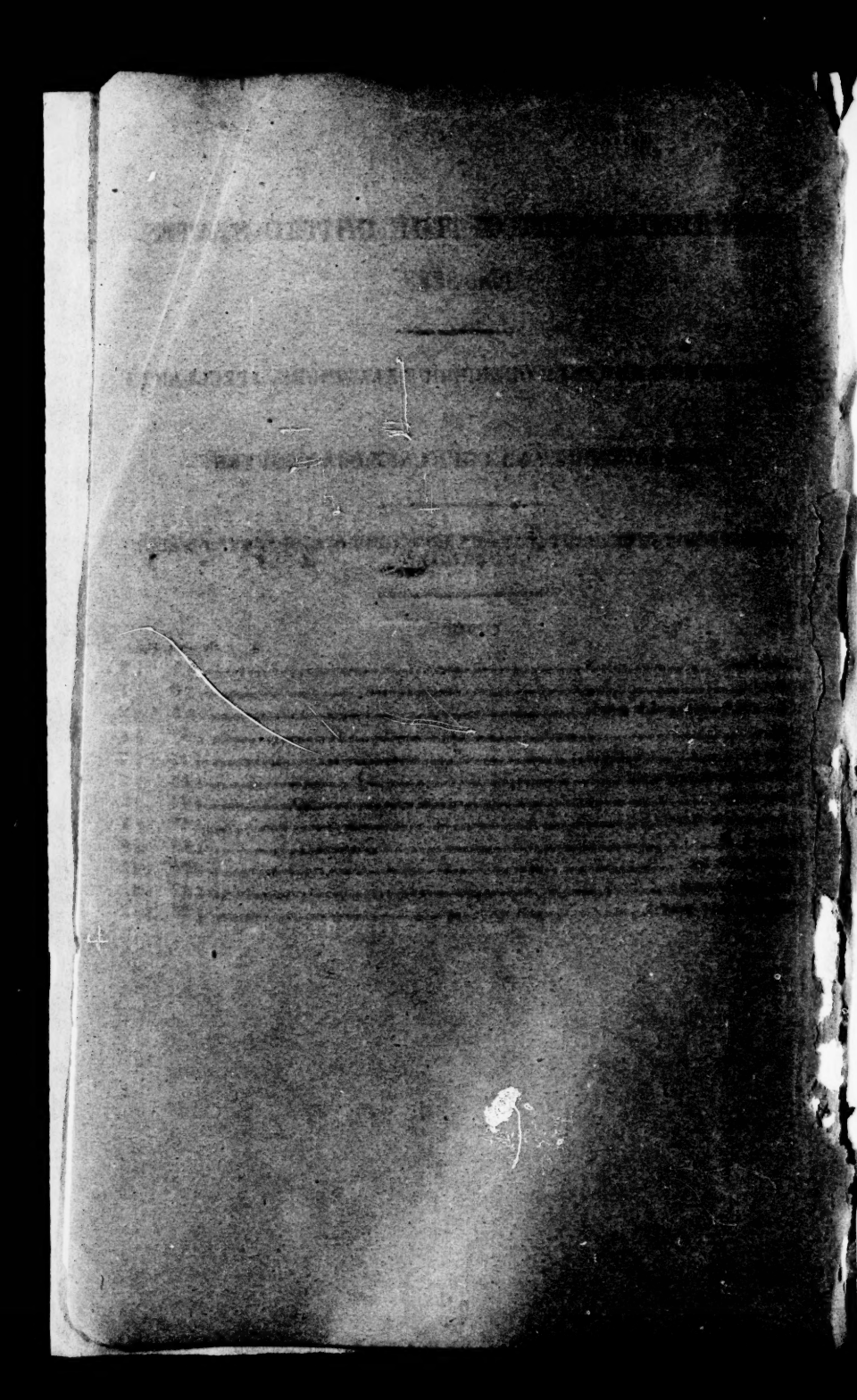


SUPREME COURT OF THE UNITED STATES.

No. 378.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THEUNITED STATES FOR THE DISTRICT OF MARYLAND.

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THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable William F. Giles, judge of Maryland district; William Price, esquire, attorney; Washington Bonifant, esq., marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered, that heretofore, to wit, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, the said Baltimore and Ohio Railroad Company, the defendants in this cause, by John H. B. Latrobe, esq., its attorney, prosecuted and sued forth out of the circuit court here the writ of the United States of America of certiorari, directed to the judge of the superior court of Baltimore City, in the words and of the tenor following, to wit:

Certiorari.

2 THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To the judge of the superior court of Baltimore City, greeting:

Whereas lately, in the said superior court of Baltimore City, a certain Baltimore and Ohio Railroad Company was summoned to answer unto the mayor and city council of Baltimore in a plea, &c., which said plea, as it is said, is still depending before you in the said superior court undetermined, and the circuit court of the United States for the fourth circuit, in and for the Maryland district, being desirous, for certain reasons, that the record and proceedings in the plea aforesaid should by you be certified to them, you are therefore hereby commanded to send, under your seal, the record of the proceedings aforesaid, in the plea aforesaid, with all things touching the same, by whatever names the parties aforesaid, in the plea aforesaid, may be called, unto the said circuit court of the United States to be held in the city of Baltimore on the first Monday in November next, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able thereon to proceed and to do what shall appear to them of right ought to be done.

Witness the Honorable R. B. Taney, chief justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-three.

Issued 21 October, 1864.

JAS. W. CHEW, *Cl'k Circuit Court.*

J. H. B. L.

3 At the time of prosecuting and suing forth of the said writ, the said defendants, by their attorney aforesaid, filed in the circuit court here the following petition, to wit:

To the honorable the judges of the circuit court of the United States for the district of Maryland.

The petition of the Baltimore and Ohio Railroad Company represents that

a suit has been commenced by the mayor and city council of Baltimore against your petitioners in the superior court for Baltimore City, the object of which is to recover from your petitioners certain sums of money withheld by them out of certain interest payable by them to the said mayor and city council upon certain bonds of the said mayor and city council, issued under circumstances which are truly set forth in the narr or declaration filed in the said court, and which sums of money have been in fact retained by your petitioners and paid over as taxes due to the United States under the decision of the commissioner of internal revenue of the United States, and to avoid the compulsory process to collect the same authorized by "the act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes."

That the question that would have to be decided in the superior court aforesaid would be whether the petitioners, the defendants, acting under color of the revenue laws of the United States, and setting up a right to make such payment of taxes under such laws, were justifiable in doing so or not—a question involving necessarily the construction of said revenue laws, which, by the laws of the United States in such cases made and provided, is a question to be decided by this honorable court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be directed by this honorable court to be issued to the said superior court, requiring it to send to this honorable court the record and proceedings in the said cause, that such proceedings may be had in this court as are proper under the circumstances.

JOHN H. B. LATROBE, *Counsel for the Petitioners.*

STATE OF MARYLAND, *Baltimore City, to wit:*

Be it remembered, and it is hereby certified, that on this eighteenth day of October, 1864, before the subscriber, a United States commissioner, personally appeared John W. Garrett, president of the Baltimore and Ohio Railroad Company, and made oath according to law that the matters and things in the above petition set forth are just and true to the best of his knowledge, information, and belief.

JOHN HANAN, *U. S. Commissioner.*

[U. S. 5 cents revenue stamp.]

I, John H. B. Latrobe, attorney-at-law practicing in the superior court of Baltimore City, as well as in the circuit court of the United States for the Maryland district, do hereby certify that as counsellor for the Baltimore and Ohio Railroad Company, the above-named petitioners, I have examined the proceedings against them, and have carefully examined into the matters set forth in the petition, and I believe them to be true.

JOHN H. B. LATROBE, *Attorney for Petitioners.*

At which said first Monday in November, to wit, in the year last aforesaid, and the return day of the foregoing writ, the judge of the superior court of Baltimore City aforesaid, certify and transmit to the circuit court here, in obedience to the command of the said writ, a record of the proceedings in the plea aforesaid before him had, together with the said writ, and which said record of the proceedings aforesaid is in the words and of the tenor following, to wit:

Record.

STATE OF MARYLAND, *City of Baltimore, to wit:*

At a session of the superior court of Baltimore City, in the thirteenth judicial circuit of the State of Maryland, begun and held at the court-house

in and for the city aforesaid, on the second Monday in September, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Robert N. Martin, judge; John J. Danaker, esq., sheriff; Alford Mace, clerk.

Among other were the following proceedings, to wit:

THE MAYOR AND CITY COUNCIL OF BALTIMORE
6 *vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered, that heretofore, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-four, the said the mayor and city council of Baltimore, by William Price, esquire, its attorney, prosecuted and sued forth out of the superior court here the writ of the State of Maryland of summons, to the sheriff of Baltimore City aforesaid directed, in the words and of the tenor following, to wit:

BALTIMORE CITY, *to wit:*

The State of Maryland to the sheriff of Baltimore City, greeting:

[SEAL'S PLACE.] You are hereby commanded to summon the Baltimore and Ohio Railroad Company, of Baltimore City, to appear before the superior court of Baltimore City, to be held at the court-house in the same city on the second Monday of September next, to answer an action at the suit of the mayor and city council of Baltimore. And have you then and there this writ. Witness the Honorable Robert N. Martin, judge of the said court, the third day of September, 1864.

ALFORD MACE, *Clerk.*

And the said plaintiff, by its said attorney, on the day of prosecuting and suing forth of the aforegoing writ, declared against the said defendants in the plea aforesaid, in form following, to wit:

7 STATE OF MARYLAND, *Baltimore City, to wit:*

The mayor and city council of Baltimore, by Wm. Price, their attorney, sue the Baltimore and Ohio Railroad Company, a corporation chartered by this State, for that whereas by an ordinance of the said mayor and city council, passed on the 27th day of September, 1853, it was, amongst other things, provided that whenever the said defendant should in the mode therein provided signify in writing, and under its corporate seal, its acceptance of the terms and provisions of the said ordinance, and should at the same time deposit with the register of the city a mortgage pledging all the real and personal estate of the said company, their road or roads, with their tolls and revenues, as security to the plaintiffs for the payment, as thereinafter provided, of the principal and interest of the loan hereby made, it should be the duty of the commissioners of finance of the said city to issue certificates of stock of the mayor and city council of Baltimore, with coupons or otherwise in their discretion, to the amount of five millions of dollars, redeemable on the 1st day of January, 1890, the interest payable quarterly, on the first day of January, April, July, and October in each year, the commissioners to use their discretion whether to issue five per cent. sterling bonds or six per cent. currency bonds, payable in Baltimore, and should proceed to sell the said bonds or certificates on the best terms they could obtain, not less than par, and pay over the proceeds thereof to the register of the city, the said commissioners having elected to issue six per cent. currency bonds, and the city register was by the said ordinance authorized to pay to the defendant the amount of money he might receive from
8 time to time from the said commissioners of finance on account of the

sale of the said certificates, reserving ten per cent. thereof to be used as a sinking fund to pay the principal of their said loans at matutity. And whereas it was also provided by the said ordinance that the acceptance thereof by the said company in the manner therein provided, and the execution of the mortgage required to be given by the defendants as aforesaid, should be construed and understood as obliging the said company to pay to said register the principal sum of five millions of dollars issued under the provisions of the said ordinance, less the amount of the said sinking fund and its acumulations in the manner therein provided, and also to pay to the said city register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds so issued quarterly and in advance at least ten days previous to the days of the several months aforesaid on currency bonds, which said payments should commence to be made in advance of the first payments which should be required to be made by the plaintiffs on said certificates or bonds, and should continue to be made as aforesaid until the repayment by the defendant to the plaintiffs of the principal sums of money which should be issued as aforesaid. And whereas the said advance was by an act passed by the general assembly of Maryland on the 1st day of March, 1854, chap. 34, *was* confirmed, and full power thereby conferred on the plaintiffs and upon the commissioners of finance and the register of the said city to carry into effect all the provisions of the said ordinance in the same manner to all intents and purposes as if the said mayor and city
9 council had been, previously to the passage of the said ordinance, authorized and empowered, by an of the general assembly of Maryland, to enact an ordinance in the precise terms of the ordinance above recited at length, and to provide for carrying the same into effect, the said act to take effect from its passage; and the plaintiffs further in fact say that the defendant did signify in writing, under its corporate seal, its acceptance of the terms and conditions of the said ordinance, and did at the same time deposit with the register of the city a mortgage pledging all the real and personal estate, roads, tolls, and revenues, as security to the mayor and city council of Baltimore for payment, as therein provided, of the principal and interest of the said loan of five millions of dollars, and the proceeds of the said certificates or bonds, amounting in all to five millions of dollars, less the said sinking fund, was paid over to and received by the defendant, and all the conditions, stipulations, and provisions of the said ordinance having been fully complied with and performed, the defendant, by force of the provisions, became bound to pay to the plaintiffs the interest upon the said loan of five millions of dollars, at the rate of six per centum per annum, quarterly, at the days and times before mentioned; that is to say, the said defendant became bound to pay to the plaintiffs the sum of three hundred thousand dollars per annum until the 1st day of January, 1890, in quarterly payments of seventy-five thousand dollars, at the days and times mentioned in the said ordinance, of all which said premises the said defendant,
10 after the making of the said ordinance and the confirmation thereof by the general assembly of Maryland, and after the execution and delivery of the said mortgage, and after the compliance with and performance of all the conditions, stipulations, and provisions of the said ordinance, as aforesaid, had notice; by means whereof the said defendant became liable to pay, and ought to have paid, to the plaintiffs, ten days before the 1st day of October, 1862, and also ten days before the 1st day of January, 1863, and also ten days before the first day of April, 1863, and also ten days before the first day of July, 1863, and also ten days before the first day of October, 1863, and also ten days before the 1st day of January, 1864, and also ten days before the 1st day of April, 1864, and also ten days before the 1st day of July, 1864, and at and upon each and every of said days and times,

the sum of seventy-five thousand dollars for interest accruing and due on said loan, whereby and by reason of the said several sums of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs to have and demand of the defendant the said several sums of money, payable as aforesaid. And whereas also the plaintiffs heretofore, to wit, on the 1st day of December, 1853, did loan to the defendant, and the defendant did borrow from the plaintiffs, the sum of five millions of dollars, and did engage and promise to pay the interest, at six per cent. per annum, to accrue thereon quarterly, ten days prior to the first days of January, April, July, and October, yearly, and every year, until the 1st day of January, 1890, when the principal of the said debt was, by the terms of the said loan, to be paid, which said loan was provided for, upon the terms aforesaid, by
11 an ordinance of the mayor and city council of Baltimore, passed on the 27th day of September, 1853, the said ordinance having been ratified and confirmed by an act of the general assembly of Maryland, passed on the 1st day of January, 1854, chap. 34; and the said ordinance, and all the provisions and details thereof, made as valid to all intents and purposes as if the said plaintiffs had been, previously to the passage thereof, authorized and empowered by an act of the general assembly of Maryland, to enact the same. And the said sum of five millions of dollars having been loaned and advanced to the said defendants, and the same having been received by it, upon the terms and conditions mentioned in the said ordinance, the said defendant, in consideration thereof, undertook, agreed, and promised to pay to the plaintiffs, and ought to have paid to the plaintiffs, the sum of seventy-five thousand dollars on each of the several days and times following, that is to say, ten days before the 1st day of October, 1862, ten days before the 1st day of January, 1863, ten days before the first of April, 1863, ten days before the 1st of July, 1863, ten days before the 1st of October, 1863, ten days before the 1st of January, 1864, ten days before the 1st of April, 1864, and ten days before the 1st of July, 1864, and at and upon each and every of said days and times, the same being the interest accruing on the said loan, according to the terms of the said loan; yet the said defendant, although often requested so to do, hath not as yet paid the said several sums of money to either of them, the said plaidtiffs, but hath hitherto wholly neglected and refused, and still neglects and refuses,
12 so to do, to wit, at Baltimore City aforesaid, to the damage of the said plaintiffs fifty thousand dollars, current money, which sum the plaintiffs claim in this suit.

WM. PRICE, *Att'y for plaintiffs.*

A copy of which declaration was made and sent, with the said writ, to the sheriff of Baltimore City aforesaid, thereon endorsed "To be served on defendant."

At which mentioned second Monday of September, to wit, in the year last aforesaid, being the return day of the aforegoing writ, comes again into the superior court here the said plaintiff, by its attorney aforesaid, and the sheriff of the city aforesaid, to whom the said writ was, in form aforesaid, directed, makes return thereof to the court here thus endorsed, to wit:

"Summons copy left."

JOHN J. DANEKER, *Sheriff.*

And the said defendant, being called, appears in court here by John H. B. Latrobe, esq., its attorney.

And thereupon, in pursuance of the notice aforesaid, it is ruled by the court here, on motion of the said plaintiff, by its attorney aforesaid, that the said defendants plead to the declaration aforesaid within the ensuing fifteen

days, or judgment by the court will be rendered against it in default thereof.

And afterwards, to wit, on the twenty-fourth day of October, in the year last aforesaid, the following writ of "certiorari" issued out of the circuit court of the United States for Baltimore City, and was filed in said cause, commanding the superior court to send, under its seal, the record of the
13 proceeding in the plea aforesaid, with all things touching the same, by whatever names the parties aforesaid, in the plea aforesaid, may be called, unto the said circuit court of the United States for Baltimere City, to be held at the city of Baltimore, on the first Monday in November next, which said writ is in the words and of the following tenor, to wit:

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To the judge of the superior court of Baltimore City, greeting:

[SEAL'S PLACE.] Whereas lately, in the said superior court of Baltimore City, a certain Baltimore and Ohio Railroad Company was summoned to answer the mayor and city council of Baltimore in a plea, &c., which said plea, as it is said, is still depending before you in the said superior court undetermined, and the circuit court of the United States for the fourth circuit, in and for the Maryland district, being desirous, for certain reasons, that the record of proceedings in the plea aforesaid should by you be certified to them, you are hereby commanded to send, under your seal, the record of the proceedings aforesaid, in the plea aforesaid, with all things touching the same, by whatever names the parties aforesaid in the plea aforesaid may be called, into the said circuit court of the United States, to be held at the city of Baltimore, on the first Monday in November next, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able thereon to proceed and to do what shall appear to them ought to be done.

14 Witness the Honorable R. B. Taney, chief justice of our Supreme Court, this first Monday in December, in the year of our Lord one thousand eight hundred and sixty-three.

Issued 21st October, 1864.

J. H. B. L. JAS. W. CHEW, *Cl'k Circuit Court.*

It is thereupon ordered by the superior court of Baltimore City that a transcript of the record of proceedings in the cause aforesaid, with all things thereunto relating, be transmitted to the said circuit court of the United States for Baltimore City, to be held at the city of Baltimore on the first Monday in November next.

And the same is transmitted accordingly.

In testimony that the within and aforegoing is truly taken from the record of proceedings of the superior court of Baltimore
[SEAL'S PLACE.] City, I have hereunto subscribed my name and affixed the seal of the superior court of Baltimore City, this third day of November, A. D. 1864.

ALFORD MACE,
Clerk Superior Court Baltimore City.

[U. S. 5-cent stamp.]

And now here, at this day, to wit, on the first Monday in November, in the year last aforesaid, come into the circuit court here, as well the said the mayor and city council of Baltimore, by William Price, esquire, its attorney, as the said Baltimore and Ohio Railroad Company, its attorney.

15 And the said Baltimore and Ohio Railroad Company, by its attor-

ney aforesaid, comes and defends the wrong and injury when, &c., and says that it did not undertake or promise in manner and form as the said plaintiff hath above complained against it, and of this it puts itself upon the country, &c.; and the said plaintiff doth the like.

Whereupon, for trying the issue aforesaid between the parties aforesaid within joined, it is ordered by the court here that a jury thereon appear before the court held immediately, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. Thereupon it is ordered by the court here that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid be drawn by ballot, and thereupon the twenty persons being so drawn by ballot and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons, being called, come, to wit: David Martin, John Bangs, Adolph Van Ruth, Edward R. Sparks, James Burnside, Jehu Peregoy, James N. Burnham, Wm. R. Sanderson, Joseph G. Brewer, David E. Price, Henry E. England, and John Smith, who, being empannelled and sworn to say the truth in the premises, upon their oath do say that the said defendant did not undertake and promise in manner and form as the said plaintiff hath above complained against it. Therefore it is
16 considered by the court here that the said mayor and city council of Baltimore take nothing by his said writ, but that he be, in mercy for his false complaint, and that the said Baltimore and Ohio Railroad Company go thereof without day, &c. It is also considered by the court here that the said Baltimore and Ohio Railroad Company do recover against the said the mayor and city council of Baltimore the sum of twenty-six dollars and eighty cents, for its costs and charges by it about its defence in this behalf *in this behalf* sustained, to the said Baltimore and Ohio Railroad Company by the court here now adjudged, according to the form of the statute in such cases made and provided, and that the said Baltimore and Ohio Railroad Company have thereof its execution, &c.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here the said mayor and city council of Baltimore, by its attorney aforesaid, tendered to the court here the following bill of exception, and which is by the court here signed and sealed, and which is in the form following, to wit:

In the circuit court of the United States for the Maryland district.

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

The plaintiff and defendant, by their respective counsel, to obviate
17 the necessity of proof of the different matters necessary to raise the questions involved in the issue, made the following admission of facts, and which were read to the jury accordingly.

Admission of facts.

In the circuit court of the United States for the district of Maryland.

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is agreed, 1. That the mayor and city council of Baltimore, having

full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27, 1853, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore."

2. That said ordinance may be read in evidence on the trial of the above cause, from the printed ordinances of the city.

3. That in pursuance of the provisions of the said ordinance, the certificates of stock of the mayor and city council of Baltimore, and the payments provided for in the 2d section, were made to the defendants, reserving the ten per cent. to be used as a sinking fund.

18 4. That the Baltimore and Ohio Railroad Company have, since the issue of said certificates of stock, paid regularly to the register of the city of Baltimore the interest on the whole amount of five million dollars, issued under the said ordinance, agreeable to the terms of said ordinance, until the first day of July, in the year 1863.

5. That since the date last aforesaid, the said company, in paying the interest on the said certificates to the said register, have deducted three per cent. therefrom, which deduction they have paid to the commissioner of internal revenue of the United States, upon his peremptory demand therefor, he insisting that he was entitled thereto, upon a proper construction of the acts of Congress of the United States, to provide internal revenue to support the government, &c.

6. That the payments thus made to the commissioner of internal revenue were not made until after repeated correspondence, in which the defendants sought to prove that he was wrong in making the demand, and was only paid to avoid the consequences provided for in the act, in case of refusal.

7. That the payments thus made to the register and withheld from the plaintiffs amount at this time to the sum of $18,000, which this action is brought to recover, as being withheld without authority, and in violation of the obligations entered into by the company, not only in accepting said ordinance and receiving the proceeds less ten per cent. of the sales of the stock certificates, but in executing the mortgage provided for in the

19 said ordinance, and which it is admitted was duly executed on the 16th February, 1854, and which it is agreed may be read in evidence either from the original paper or a certified copy.

Mortgage.

The Baltimore and Ohio Railroad Company mortage to the mayor and city council of Baltimore.

This indenture, made this sixteenth day of February, in the year eighteen hundred and fifty-four, between the Baltimore and Ohio Railroad Company, of the first part, and the mayor and city council of Baltimore, of the second part. Whereas an ordinance was enacted on the twenty-seventh day of December, 1853, and entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," the tenth section of which ordinance enacted that it should have no effect until confirmed by the general assembly of Maryland then next ensuing the date of said ordinance; and whereas, at the present January session of the year 1858 an act has been passed by the said general assembly, entitled "An act to confirm an ordinance of the mayor and city council of Baltimore, entitled 'An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount

of five millions of dollars to complete their road to the city of Wheel-
20 ing, to fund their debt, and especially to lay a second tract as far as Piedmont, 218 miles distant from the city of Baltimore,' and to confer upon said mayor and city council and upon the commissioners of finance, and the register of said city, the powers necessary for carrying into effect the provisions of the said ordinance," by which said act of the general assembly the same validity was given to the said ordinance as if the said mayor and city council had been previously to the passage of the said ordinance authorized and empowered by an act of the said general assembly to enact an ordinance in the precise terms of the ordinance above recited, and at length and to provide for carrying the same into effect, the said act so as aforesasd passed, stipulating that nothing therein or in said ordinance contained should be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland had in the revenue of the said Baltimore and Ohio Railroad Company, for loans heretofore made by the said State to said company, or for the interest due or that might become due thereon to the said State; and whereas the said Baltimore and Ohio Railroad Company, by their officers legally authorized to act on their behalf in such matters, having signified in writing, sealed with their corporate seal, their acceptance of the terms and provisions of said ordinance, as required to do by the first section thereof, do now propose to deposit with the register of the said city a mortgage, (previously to be approved by the city councellor,) wherein they shall pledge all their real and personal estate,
21 road or roads, the tolls and revenues: as security to the said mayor and city council, for the payment, as provided in the said ordinance, of the principal and interest of the loan, made by said ordinance:

Now this indenture witnesseth, that the Baltimore and Ohio Railroad Company, for and in consideration of the premises, and for the purpose of fully complying on their part with the requisitions in all respects of the said ordinance and act of assembly, and in further consideration of the sum of five dollars, to them in hand paid by the said mayor and city council of Baltimore, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, assigned, transferred, and made over to the mayor and city council of Baltimore aforesaid, all their the said Baltimore and Ohio Railroad Company's real and personal estate, road or roads, the tolls and revenues, with the appurtenances. To have and to hold the said real and personal estate, road or roads, the tolls and revenues, with the appurtenances, to the said the mayor and city council of Baltimore, in as full and ample a manner as the said Baltimore and Ohio Railroad Company are entitled to have, and to hold the same as security to the mayor and city council of Baltimore, for the payment, as provided in the ordinance aforesaid, of the principal and interest of the loan made thereby: Provided, nevertheless, and it is the true intent and meaning of the parties to these presents, that if the said
22 Baltimore and Ohio Railroad Company do and shall pay to the register aforesaid the principal sum of five millions of dollars, issued under the provisions of the said ordinance, less the amount of the sinking fund provided for therein, and its accumulations, mentioned in the third section of the said ordinance, at least once a month before the day on which the certificates or bonds, directed by said ordinance to be issued shall become redeemable, and shall also pay to the said register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds issued quarterly, and in advance at least ten days previous to the first days of the several months mentioned in said ordinance, on currency bonds, and thirty days previous to aforesaid first days on sterling bonds,

which said payment shall commence to be made in advance of the first payments of interest, which shall be required to be made by the mayor and city council of Baltimore on said certificates or bonds, and shall continue to be made as aforesaid until the repayment by the said company to the mayor and city council of Baltimore of the principal sums of money which shall or may be issued as aforesaid; and if the said Baltimore and Ohio Railroad Company do and shall well and truly, in the event of the said commissioners of finance electing to issue 5 per cent. sterling bonds, pay all other expenses incidental to such payment, as well as all and any expense incidental to the issue of any of the bonds, whether currency or sterling, as aforesaid, and shall pay the expense of recording, under direction of the city register, this indenture of mortgage in the proper offices of record where such
23 instruments are recorded, in all counties, districts, cities, or towns, whether in the State of Maryland or out of it, wherein said company have any real or personal estate, road or roads, tolls or revenues, then and in these events these presents shall be null and void; else to remain in full force and effect. It being understood that until a failure to comply with their obligation in the premises, the said Baltimore and Ohio Railroad Company shall be permitted to have and enjoy the possession of the property hereby mortgaged, and to receive and take the income and revenues thereof.

And this indenture further witnesseth, that the said Baltimore and Ohio Railroad Company hath appointed, and by these presents doth hereby appoint, Joshua J. Atkinson, as their attorney to acknowledge this indenture to be their act and deed, to the end that the same may be recorded according to law.

In testimony whereof, the president of the said company hath hereto set his hand and caused the seal of the said company to be affixed hereto the day and year first above written.

WM. G. HARRISON. [SEAL'S PLACE.]
Pres't B. & O. R. R. Co.

Signed, sealed, and delivered in presence of—
JOHN H. B. LATROBE.
JOSEPH J. ATKINSON.
WM. N. BRICE.
EDW'D J. PETERS.

STATE OF MARYLAND, *Baltimore City, to wit:*

24 On this 16th day of February, in the year 1854, before the subscribers, two justices of the peace of the said State, in and for said city, personally appeared Joshua J. Atkinson, who, we are satisfied of own knowledge, is the party named and described as the attorney in the foregoing indenture named, and in pursuance of the authority therein given, acknowledge the same indenture to be the act and deed of the Baltimore and Ohio Railroad Company. And at the same time before us personally appeared John J. Graves, an officer of the corporation of the mayor and city council of Baltimore, and register thereof, and made oath according to law that the consideration set forth in the indenture of mortgage aforesaid is true and *bona fide* as therein set forth.

Acknowledged before—

WM. N. BRICE.
EDW'D J. PETERS.

I approve of the foregoing mortgage.

BENJ'N C. PRESSTMAN,
Counsellor for the city.

STATE OF MARYLAND, *City of Baltimore, ss:*

I, James B. Latimer, a commissioner appointed by the governor of the State of Virginia for the State of Maryland aforesaid, do certify that William G. Harrison, president of the Baltimore and Ohio Railroad Company, whose name is signed to the writing above, bearing date the sixteenth day of February, eighteen hundred and fifty-four, has acknowledged the same in my State aforesaid.

25 In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, as commissioner aforesaid, this six-
[SEAL'S PLACE.] teenth day of February, eighteen hundred and fifty-four.

JAS. B. LATIMER, *Commissioner.*

STATE OF MARYLAND, *Baltimore City, sct:*

I hereby certify that William N. Brice and Edward J. Peters, esquires, before whom the annexed acknowledgment and affidavit were made, and who have thereto subscribed their names, were at the time of so doing two justices of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of
[SEAL.] the superior court of Baltimore City, this 16th day of February, A. D. 1854.

EDW'D DOWLING,
Clerk of the Superior Court of Baltimore City.

Rec'd 16th February, 1854, of grantee six dollars in lieu of stamp under act 1846, ch. 61.

EDW'D DOWLING, *Clerk.*

Received to be recorded the 16th day of February, 1854, at 5 o'clock p. m. Same day recorded and examined.

Per EDW'D DOWLING, *Clk.*

STATE OF MARYLAND, *City of Baltimore, sct:*

I hereby certify that the aforegoing is truly transcribed from Liber E. D. No. 49, folio 230, &c., one of the land records of Baltimore City.

In testimony whereof, I hereto set my hand and affix the
26 [SEAL.] seal of the superior court of Baltimore City, on the 5th day of September, A. D. 1864.

ALFORD MACE, *Clk.*

[U. S. 5-cent stamp.]

It is agreed that the statement of amounts paid by the defendants to the said commissioners shall be taken as a part hereof as the same is annexed hereto.

It is agreed that should this case be taken to the Supreme Court of the United States on appeal, the ordinance of the mayor and city council of Baltimore, herein referred to, as well as the act of assembly confirming the same, may be read from the printed volumes of the ordinances and acts of assembly respectively.

It is also admitted that the plaintiffs are a public municipal corporation, under the name of the mayor and city council of Baltimore.

It is also admitted that the paper hereto annexed marked "$5,000,000 bond" is the bond issued by the mayor and city council of Baltimore under the ordinance aforesaid.

WM. PRICE, *for Pl'ff.*
JOHN H. B. LATROBE, *for Def't.*

$5,000,000 *bond, City of Baltimore.*

No. —. $ ——.

Five million loan, 1890, six per cent.

This is to certify that the mayor and city council of Baltimore are
27 indebted to me ——— in the sum of ——— dollars, redeemable on the first day of January, 1890, on the presentation and surrender of this certificate, with interest thereon in the meantime at the rate of six per centum per annum, payable quarter-yearly, on the first days of January, April, July, and Octoberin each year.

This certificate is issued by virtue of the ordinance of the mayor and city council of Baltimore, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," and is only transferable at the mayor's office in person or by attorney, and on the delivery of this certificate to the transferee.

In witness whereof, I, the mayor of the city of Baltimore, have hereunto set my hand and affixed the seal of the said corporation, this — day of ——, in the year of our Lord eighteen hundred and fifty —.

Interest to commence from the —— day of ——, 18—.

Redeemable on the first day of January, 1890.

———, *Mayor.*

———, *Register.*

Countersigned and registered.

Whereupon the plaintiff, by his counsel, offered the following prayer for instructions to the jury:

Plaintiff's prayer.

The plaintiffs pray the court to instruct the jury that the plaintiffs
28 are not subject to the payment of the tax in question under the acts of Congress of July 1st, 1862, and that whether the defendants are subject to the tax and liable to pay it or not, the defendants cannot retain from the plaintiffs any part of the interest due them by reason of their obligation to pay tax due to the government.

Which the court rejected, but upon the request of the defendant's counsel, granted the following prayer:

Defendant's prayer.

The defendant, by his counsel, prays the court to instruct the jury that upon the facts in this cause, and upon the true construction of the act of Congress to provide internal revenue &c., approved July 1st, 1862, the defendant was bound to pay to the United States the tax of three per cent. of the amount of interest due to the city on the mortgage which has been offered in evidence, and that if it has made such payment, it is proper to deduct it from the interest payable under the said mortgage to the said city, and that consequently the plaintiff cannot recover, and the verdict of the jury must be for the defendant.

To the granting of which prayer of the defendant, as well as to the refusal to grant the plaintiff's prayer, the plaintiffs, by their counsel, prayed leave to except, and that the court would sign and seal this their bill of exception, which the court do this third day of December, in the year 1864.

WILLIAM F. GILES. [SEAL.]

And thereupon the said mayor and city council of Baltimore prays
29 an appeal from the judgment aforesaid, so as aforesaid rendered, to the Supreme Court of the United States, and the same is granted it.

It is therefore ordered by the court here that the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the said Supreme Court of the United States. And the same are transmitted to the said court accordingly.

Test: JAS. W. CHEW, *Clerk.*

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

I hereby certify that the aforegoing is truly taken from the record of proceedings of the circut court of the United States for the fourth circuit, in and for the Maryland district.

In testimony whereof, I hereunto subscribe my name and affix
[SEAL.] the seal of the said circuit court, this third day of December, in the year of our Lord one thousand eight hundred and sixty-four.

JAMES W. CHEW, *Clerk.*

Filed February 3, 1865.

REC. 378—3

IN THE SUPREME COURT OF THE UNITED STATES.

AN APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

THE MAYOR AND CITY COUNCIL OF BALTIMORE

vs.

THE BALTIMORE & OHIO RAIL ROAD CO.

APPELLANT'S BRIEF AND POINTS.

APPELLANT'S BRIEF AND POINTS.

The Baltimore and Ohio Rail Road Company being in great pecuniary need, and being regarded by the corporation of Baltimore and the State of Maryland as engaged more in a work of public utility than of private speculation for stockholders, the corporation of Baltimore, at its December session, 1853, passed the ordinance which is recited in the following quoted law of the State of Maryland, the State ratifying such ordinance by said law, and imposing an additional condition on the Rail Road Company. The appellant, for the convenience of the Court, sets out this law literally in the brief, remarking that no part of it is italicised as printed in the volume of laws, this having been done by counsel to point attention and facilitate reference:

Chapter 34—*Passed March* 1, 1854.

An Act to confirm an ordinance of the Mayor and City Council of Baltimore, entitled an ordinance to aid the Baltimore and Ohio Rail Road Company, by a loan to the amount of five millions of dollars, to complete their road to the City of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, two hundred and eighteen miles distant from the City of Baltimore, and to confer upon said Mayor and City Council, and upon the commissioners of finance and the register of said city, the powers necessary for carrying into effect the provisions of said ordinance.

WHEREAS, the Mayor and City Council of Baltimore at a session held in December last, passed and in the terms following, that is to say:

SECTION 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That whenever the Baltimore and Ohio Rail Road Company, by their officers legally authorised to act on their behalf, in such matters shall signify in writing, sealed with their corporate seal, their acceptance of the terms and provisions of this ordinance and shall at the same time deposit with the register of the city, a mortgage (to be previously approved by the city counsellor,) wherein said company shall pledge all their real and personal estate, road or roads, the tolls and revenues as security to the Mayor and City Council of Baltimore, for the payment as hereinafter provided, of the principal and of the interest of the loan hereby made, it shall be the duty of the commissioners of finance of the city of Baltimore, and they are hereby authorised to issue certificates of stock of the Mayor and City Council of Baltimore, with coupons or otherwise in their discretion to the amount of five millions of dollars, redeemable on the first day of January, eighteen hundred and ninety, the interest payable quarterly on the first day of January, April, July and October in each year, the said commissioners likewise to use their discretion, whether to issue five per cent. sterling bonds, payable in London, or six per cent. currency payable in the city of Baltimore, and shall proceed to sell the said bonds or certificates on the best terms which they can obtain therefor, not less than par, and in such sums as may be required by said rail road company, and pay over the proceeds thereof to the register of the city, *and it is likewise understood and provided that if the commissioners of finance shall at any time elect to issue five per cent. sterling bonds as aforesaid, the cost of exchange, commission to agent in London, and all other expenses incidental to such payment, shall be chargeable to and paid by the president and directors of the Baltimore and Ohio Rail Road Company aforesaid, and it is*

hereby further provided, that any and all expenses incident to the issue of any of the bonds, whether currency or sterling as aforesaid, shall in like manner be chargeable to and paid by the said rail road company.

SEC. 2. *And be it enacted,* That the city register, be, and he is hereby authorised to pay to the Baltimore and Ohio Rail Road Company, the amount of money he may receive from time to time, from the commissioners of finance on account of the sale of said certificates reserving ten per cent. thereof to be used as a sinking fund, to pay the principal of said loan at maturity.

SEC. 3. *And be it enacted,* That the said reservation of ten per cent. amounting to five hundred thousand dollars, shall by the register of the city of Baltimore, with the quarterly interest thereon, be invested in the public debt of the city of Baltimore, and so from time to time, until the maturity of the bonds, when so much thereof as may be necessary shall be applied to the payment of the principal sum of said bonds, and to release the said company from all responsibility for the mortgage herein created, in so far as said sinking fund may be capable of paying the same ; and the said mortgage as mentioned to be given by the said Baltimore and Ohio Rail Road Company, in section first of this ordinance, *shall be recorded under the direction of the city register and at the expense of the said company in the proper offices of record, where such instruments are recorded in all counties, districts, cities or towns, whether in the State of Maryland, or out of it, wherein said company have any real or personal estate, road or roads, tolls or revenues, as mentioned in the first section of this ordinance.*

SEC. 4. *And be it enacted,* That if at the maturity of said bonds the said sinking fund shall have accumulated to an amount exceeding the principal sum of the loan authorised in this ordinance of five millions of dollars, the said excess shall be paid into the city treasury for the use of the city,

and be applied to the extinguishing the internal improvement debt.

SEC. 5. *And be it enacted*, That the premium (if any) that may be received on account of the sale of the said certificates or bonds, shall be converted into a sinking fund and invested in the public debt of the city of Baltimore, and so from time to time with the interest quarterly accruing, to be applied to the payment of the original internal improvement debt of the city.

SEC. 6. *And be it enacted*, That the acceptance of this ordinance by the said company, and the mortgage required to be given by said company, shall be construed and understood as obligating the said company to pay to the said register the principal sum of five millions of dollars, issued under the provisions of this ordinance, less the amount of the sinking fund, and its accumulations, mentioned in the third section of this ordinance at least one month before the day on which the certificates or bonds hereby directed to be issued, shall become redeemable and shall also pay to the said register interest at the rate of six per cent. per annum, on the whole amount of said certificates or bonds so issued quarterly, and in advance at least ten days previous to the first days of the several months aforesaid on currency bonds, and thirty days previous to aforesaid first days on sterling bonds which said payments shall commence to be made in advance of the first payments of interest, which shall be required to be made by the Mayor and City Council of Baltimore on said certificates or bonds and shall continue to be made as aforesaid until the repayment of the said company to the Mayor and City Council of Baltimore, of the principal sums of money which shall or may be issued as aforesaid.

SEC. 7. *And be it enacted*, That the said register shall procure a stamp with the words "Safety Fund Stock—not to be re-issued," legibly cut thereon, and shall cause the same to

be fairly impressed across the face of each certificate of Baltimore city stock invested as aforesaid, and cause an entry of the said certificates to be made in the books of his office from time to time, as the same may come in his possession, and shall make an exhibit of the said entries and certificates to the committee annually appointed to examine the books and accounts of his office, which committee shall make such examination a part of their report to the city council, stating the amount of said certificates and general condition of said safety fund.

SEC. 8. *And be it enacted, That in order to meet the present exigencies of the Baltimore and Ohio Rail Road Company, when the Legislature of Maryland shall have confirmed this ordinance, the register be, and he is hereby authorised to borrow upon the faith of the Mayor and City Council of Baltimore the sum of one million of dollars, redeemable at pleasure, bearing interest at the rate of six per cent. per annum, papable quarterly, and pay the same to the said company, and upon his receiving the amount of sales of the certificates as provided for in this ordinance, he shall repay the city with the interest accrued thereon from said amount of sales in lieu of paying them over to said company.*

SEC. 9. *And be it enacted,* That the ordinance entitled, an ordinance to guaranty the bonds of the Baltimore and Ohio Rail Road Company, approved December the fourteenth, eighteen hundred and fifty-three, be, and the same is hereby repealed.

SEC. 10. *And be it enacted,* That this ordinance shall have no effect until confirmed by the next General Assembly of Maryland; Now therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the said above recited ordinance be, and the same is hereby confirmed, and that full power be, and the same is

hereby conferred upon the Mayor and City Council of Baltimore, and upon the commissioners of finance and the register of said city of Baltimore, *to carry into effect all the provisions of the said ordinance*, in the same manner to all intents and purposes, as if the said Mayor and City Council had been previously to the passage of said ordinance, authorised and empowered by an act of the General Assembly of Maryland to enact an ordinance in the precise terms of the ordinance above recited at length, and to provide for carrying the same into effect.

SEC. 2. *And be it enacted*, That nothing in this act or in the said ordinance contained, shall be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland now has in the revenue of the said Baltimore and Ohio Rail Road Company, for loans heretofore made by the said State to the said company or for the interest now due or that may become due thereon, to the said State.

SEC. 3. *And be it enacted*, That this act shall take effect from and after the date of its passage.

On the 1st of July, 1862, the Congress of the United States passed an Excise Law, of which section 81 applies to the case at bar, the applicable portion of which reads as follows:

SEC. 81. *And be it further enacted*, That on and after the first day of July, eighteen hundred and sixty-two, any person or persons owning or possessing, or having the care or management of any railroad company or railroad corporation, being indebted for any sum or sums of money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is, or shall be, stipulated to be paid, or coupons representing the interest shall be or shall have been issued to be paid, and all

dividends in scrip, or money, or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits, or gains of said companies, shall be subject to and pay a duty of three per centum on the amount of all such interest, or coupons, or dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person or persons owning, possessing, or having the care or management of any railroad company or railroad corporation, are hereby authorized and required to deduct and withhold from all payments made to any person, persons, or party, after the first day of July, as aforesaid, on account of any interest, or coupons, or dividends due and payable as aforesaid, the said duty or sum of three per centum; and the duties deducted as aforesaid, and certified by the president or other proper officer of said company or corporation, shall be a receipt and discharge, according to the amount thereof, of said railroad companies or railroad corporations, and the owners, possessors, and agents thereof, on dividends and on bonds or other evidences of their indebtedness, upon which interest or coupons are payable, holden by any person or party whatsoever.

All the other facts pertinent to the case are comprised in the following agreed statement to be found on pages 7, 8 and 11 of the printed record:

Admission of Facts.

In the circuit court of the United States for the district of Maryland.

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is agreed, 1. That the mayor and city council of Baltimore, having full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27, 1853, entitled "An ordinance to aid the Baltimore and Ohio Rail

Road Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore.

2. That said ordinance may be read in evidence on the trial of the above cause, from the printed ordinances of the city.

3. That in pursuance of the provisions of the said ordinance, the certificates of stock of the mayor and city council of Baltimore, and the payments provided for in the 2d section, were made to the defendants, reserving the ten per cent. to be used as a sinking fund.

4. That the Baltimore and Ohio Rail Road Company have, since the issue of said certificates of stock paid regularly to the register of the city of Baltimore the interest on the whole amount of five million dollars, issued under the said ordinance, agreeable to the terms of said ordinance, until the first day of July, in the year 1863.

5. That since the date last aforesaid, the said company, in paying the interest on the said certificates to the said register, have deducted three per cent. therefrom, which deduction they have paid to the commissioner of internal revenue of the United States, upon his peremptory demand therefor, he insisting that he was entitled thereto, upon a proper construction of the acts of Congress of the United States, to provide internal revenue to support the government, &c.

6. That the payments thus made to the commissioner of internal revenue were not made until after repeated correspondence, in which the defendants sought to prove that he was wrong in making the demand, and was only paid to avoid the consequences provided for in the act, in case of refusal.

7. That the payments thus made to the ~~register~~ Commissioner and withheld from the plaintiffs amount at this time to the sum of

$18,000, which this action is brought to recover, as being withheld without authority, and in violation of the obligations entered into by the company, not only in accepting said ordinance and receiving the proceeds less ten per cent. of the sales of the stock certificates, but in executing the mortgage provided for in the said ordinance, and which it is admitted was duly executed on the 16th February, 1854, and which it is agreed may be read in evidence either from the original paper or a certified copy.

It is agreed that the statement of amounts paid by the defendants to the said commissioners shall be taken as a part hereof as the same is annexed hereto.

It is agreed that should this case be taken to the Supreme Court of the United States on appeal, the ordinance of the Mayor and City Council of Baltimore, herein referred to, as well as the act of assembly confirming the same, may be read from the printed volumes of the ordinances and acts of assembly respectively.

It is also admitted that the plaintiffs are a public municipal corporation, under the name of the Mayor and City Council of Baltimore.

It is also admitted that the paper hereto annexed marked "$5,000,000 bond," is the bond issued by the Mayor and City Council of Baltimore under the ordinance aforesaid.

WM. PRICE, *for Pl'ff.*
JOHN H. B. LATROBE, *for Def't.*

The mortgage will be found on pages 8, 9 and 10 of the printed record, and the form of the bond issued by the city on page 12 of the same.

On this state of case the appellant brought suit in the court below, and on proof of the above facts the plaintiff and defendant respectively presented a prayer to the court, which are set out on page 12 of printed record. The court rejected the plaintiff's prayer and granted that of defendant—to both of which rulings the plaintiff excepted, and the verdict and judgment being against the plaintiff, it has appealed to this court, and asks a reversal of the judgment for the following reasons:

1st. Because the corporation of Baltimore, by virtue of the terms of the ordinance of the city and the Act of Assembly, accepted by the Rail Road company, and the collateral mortgage, was a mere surety, which was *expressly* agreed to be indemnified for "any and all expenses incident to the issue of any of the bonds, whether currency or sterling aforesaid," which were "in like manner to be chargeable and paid by the said Rail Road company."

2d. Because independently of any express stipulations for such indemnity, the general law regulating the relation of principal and surety implies the contract of full indemnification for all expense or charges not incurred by the fault of the surety.

3d. Proposition. That it was not intended by the Act of 1862 to tax interest-bearing debts of rail roads, &c., if they were under contract to refund the tax. And also that the mortgage was never intended to be taxed, having been issued to secure a municipal corporation—one of the members of a State—for a loan made for public purposes, and not for the mere benefit of a trading corporation.

As to the 1st proposition. It is beyond all question that, as between the City Corporation and the Rail Road, the connection was merely that of principal and surety; and the express terms of guarantee against all expenses and charges of every description are to be found in first section of the ordinance, and in the language of the collateral mortgage on page 10 of the printed record. In more concise language, the engagement is quite as full as that of a lessee who covenants to pay all assessments and taxes upon the property or the rent, by whomsoever or whenever imposed.

It is very clear that by the terms of the excise law, the city had no power to deduct the tax from its bondholders for the benefit of the Rail Road Company. There is not a word of authority so to do. The surety has thus been put to a loss "incidental to the issue" of its bonds, which falls exactly within the exacted stipulations of indemnity.

If the bonds in part had been sterling bonds, it surely could not be contended under the language of the first section of the ordinance, and of the mortgage, that the immense rise of gold in 1862 and '63 would not have fallen as a loss on the Rail Road company. But the identical circumstances which caused that depreciation of the currency, caused the tax which has been assessed by the United States. Each would have been "incidental to the issue of the bonds."

It is not at all the "misfortune" of the surety, but of the principal, who stipulated to indemnify the surety against such misfortunes, whether unforeseen or improbable at the time of the contract. The contractor is bound by the language of his engagement.

Mr. Justice Swayne, announcing the opinion of this court, in a decision in 1864, says: "The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly

made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Dermott vs. Jones—2 Wallace 8.
Opinions of Heath, Justice, and Rooke, Justice, in Pollard vs. Herries. 3 Bos. & Pul. 341-2.

It is not necessary for this case to deny that Congress had the power to abridge the contract right of indemnity. Assuming the bonds to be taxable, Congress has not sought to interfere with the relations of principal and surety. It has merely prescribed of whom the tax shall be collectible, under the theory that the holder of the "evidence of indebtedness" has no other claim than that evidence of indebtedness against the Rail Road company. It leaves untouched any subsidiary contract of indemnity.

That this was the view of Congress, is seen by the following extracted portion of the new internal revenue law, approved June 30, 1864, sec. 122:

"And the payment of the amount of said duty so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebted-

ness so held by any person or party whatever, *except where said companies may have contracted otherwise.*"

Such would be the law if the alleged hardship had been unforeseen, and the contractor had failed to make "any provision for a dispensation" in case of its occurrence.

But for a tax imposition like the present, the law imposes on the contracting parties the duty of apprehension and foresight. Such is the ruling of the Supreme Court of Pennsylvania, the opinion being delivered by Mr. Justice Woodward:

"So far as I know no question has been raised under that law upon the inviolability of contracts, and perhaps the sound conclusion is, *that governmental taxation—a thing always to be anticipated when contracts are made*—does not impair the obligation of contracts within the meaning of constitutional inhibition. If this be conceded as a principle, then the mode of collecting a tax, whether by a government agent, a debtor corporation, or a manufacturer, is mere machinery, and involves no principle whatever."

Maltby vs. Reading Rail Road Company, June No. 1866, American Law Register, 485.

Upon no other theory can Congress be saved from the purpose of violating contracts ;—and on this theory, an expected hardship has occurred which was provided against by the contract of indemnity.

2d Proposition. That the general law implies a contract for full indemnification in behalf of the surety, whether he has stipulated for it or not, if the loss has not been incurred by his fault.

The situation of a surety can never be more onerous than that of the principal.

Chitty on Cont. 522. Burge on Suretyship 5—6.

"It is unnecessary to refer to authorities to show that the liability of the surety cannot exceed that of his principal."

Justice Nelson, delivering the opinion of this court in United States vs. Allsbury. 4 Wallace 186.

It pervades the whole law of suretyship in all its forms. Full indemnity is the surety's right.

A mortgagee in possession can add taxes paid to his mortgage debt.

1 Hilliard on Real Prop. 407.

The accommodation endorser the unexpected charges of circuitous exchange.

Pollard vs. Herries. 3 Bos. & Pul. 341—2.
Chitty on Cont. 504.

So of the costs of necessary suits.

The justice of the principle is peculiarly applicable to this case. The borrower at a time of great emergency wishes to cast the tax afterwards affixed upon the accommodation loan on the lender.

The injustice of this is so glaring that the appellee concedes it on page 4 of its brief. In supposing a case in which the law might be outwitted, if the parties to the transaction had so managed its form, that the municipal corporation should issue *its* bonds, and the Rail Road company guarantee them, "so as to bring the case within any exceptions that might exist in favor of municipal corporations, although every circumstance of the transaction showed that the company and not the city was the party benefitted by the transaction, *and should therefore be made to pay the tax as a part of the consideration for the advantages which it derived.*"

So if the company had guaranteed the city bonds, in *justicè* it ought to pay the tax!! This is the concession.

It is true the concession is only made to prompt the court to fix the tax on the city by indicating an unjust device by which the tax might be avoided by both parties, on the ground of the immunity of one in its character of a municipal corporation.

But so far in the case we are not looking at all at the municipal character of the city. It is simply regarded as a surety, and the appellee considers it most unjust that the party benefitted should not "be made to pay the tax as a part of the consideration for the advantages which it derived-"

Nor is it perceived that if the transaction had taken this suppositious form, that the tax law would have been outwitted. *For under all the circumstances of the case*, the guarantee would have been as much an "evidence of indebtedness," as the mortgage in this case is alleged to be. Proof would have resolved the form of the transaction into its legal ope-

ration, and the real party debtor would have been obliged to pay the tax as incidental to his accommodation.

Nor has the Rail Road any right to complain that the city cannot deduct the tax from its bondholders under the present form of issue.

The purchasers of the municipal bonds are to be assumed as having calculated the unlikelihood that such bonds would be taxed, and from such calculation bought them at a higher price than would otherwise have been given, the benefit of which enured to the appellee.

Herein lies the difference between bonds issued by the municipal corporation and those issued by a Rail Road company, and thus the question asked on page 5 of appellee's brief is answered.

This is the reason why the appellee, "the party benefitted" "should therefore be made to pay the tax *as a part of the consideration for the advantage which it derived.*"

The appellee contracted so to do—the tax is imputed by the law as an expense and charge to be expected at the time of the contract of indemnity—and in fact, in the price of the bonds the appellee received a consideration for the immunity of the city from the tax.

3d. Proposition. That it was not the design of the act of 1862, sec. 81, to tax the interest-bearing debts of internal improvement companies if these companies were under obligations to refund to their creditors the taxes so withheld. And also that this mortgage was never intended to be taxed as an "evidence of indebtedness," having been issued to secure a municipal corporation—one of the members of a State—for a loan made for purposes of public weal, and not for the benefit of a mere trading corporation and its stockholders interested in the dividends.

The history of rail roads and other similar improvements exhibits this fact: that for many years after their outset, if of any magnitude, the traffic will not compensate through the tolls proper interest on the investment—meanwhile the States which charter them and the municipal corporations to and through which they lead are in the immediate receipt of benefits by the growth of population and commerce, and the consequent increase of taxable basis, for which the stockholders of these corporations for internal improvements receive no remuneration.

For such benefits the States and municipal corporations ought to pay by gift or loan, to enable the stockholders to shorten the period of deferred dividends by a more rapid completion of their works through the aid of such gifts or loans, especially when, if the aid is in the form of a loan, no dividend is allowed to prejudice the payment of the interest.

Such benefits are like those directly received from the deepening of their harbors by cities located on tide-waters, to allow and induce vessels of commerce to visit them.

It is found that the completion of such improvements is not feasible by the mere aid of the public sovereignty, and the money of the stock-subscribers. Besides this, the improvement companies have to borrow money through the sale of its bonds and other "evidences of indebtedness," to parties who are thus preferred in the character of creditors over the stockholders, both as respects interest as opposed to dividends, or principal of the debt as opposed to stock-subscription.

In order to get this public loan, and sometimes in order to get the private loan through the sale of bonds, &c., these companies have to guarantee the payment of the full specified interest, free of all taxes, charges and expenses whatsoever.

Looking to these actual facts of life, Congress passed the revenue law approved 1st July, 1862, heretofore quoted.

Construing the whole act and others in *pari materia*, it is plain that Congress did not intend to double-tax. This appears by collating sec. 91 with sec. 81 of the act.

The purpose of sec. 81 was to use the internal improvement companies as instrumentalities for the collection of the single tax, permitting the holders of the interest-bearing debt to deduct from their taxable incomes what was withheld by the companies under the authority of this section.

But if these companies are under an obligation to refund to such holders the taxes, then it would not be deductible from income, and the debt would be twice taxed and the internal improvement companies compelled to pay both the government and the holders of the certificates of indebtedness a tax only intended to be once paid.

In order to save this necessity of collation, and to furnish a more palpable guide to the revenue officers, Congress put the legal effect of the collation into express terms in sec. 122 of the act of June 30th, 1864.

In the language of the Supreme Court of Pennsylvania already quoted, "the mode of collecting a tax, whether by a government agent, a debtor corporation, or a manufacturer, *is mere machinery, and involves no principle whatever.*"

It follows, that the mode should not be allowed to twice affix a tax intended to be only once paid.

As to the second branch of the third proposition, it seems equally plain that it was not the purpose of Congress to tax municipal holders of interest-bearing securities which guaranteed their own bonds. They were not allowed by the act to deduct the tax from their bondholders, and so far as these were citizens the tax would be collectible under the income clause. So far as they were not citizens, it was a part of the public policy at the time thus to invite the purchase of the bonds by foreign capitalists.

The public purposes of this transaction will be seen in the recognized relation of the Baltimore and Ohio Rail Road Company, as declared by the Court of Appeals of Maryland.

Mayor and City Council of Baltimore vs. Balt. and Ohio R. Road Co. 21 Maryland Reports, 91.

The appellant claims therefore a reversal of this judgment and a judgment for the appellant for $18,000, with interest as follows:

WM. HENRY NORRIS,
Attorney for Appellant.

In the Supreme Court of the United States.

An Appeal from the Circuit Court of the United States for the District of Maryland.

THE MAYOR AND CITY COUNCIL OF BALTIMORE

vs.

THE BALTIMORE AND OHIO RAIL ROAD CO.

APPELLEES' BRIEF AND POINTS.

This case is so well presented by the statement of facts, the declaration of the plaintiff, and the instructions of the Court below, that little need be said, now, in addition.

The City of Baltimore lent to the Baltimore and Ohio Rail Road Company five millions of dollars on the 16th of February, 1854.

In order, possibly, to make this loan attractive to capitalists, the City issued its bonds for the amount, less ten per cent., which was retained as a sinking fund to redeem them at maturity, on the 1st January, 1890.

Upon the whole amount of the bonds, $5,000,000, the Rail Road Company undertook to pay the interest.

It was supposed that the accumulation of the half million retained as a sinking fund would, by the compounding of the interest, grow to be equal to the entire loan—or, in other words, afford the means of paying it off at maturity.

But this might not be, and, therefore, in the mortgage which was given to the City to secure the payment by the Company of the interest on the City's bonds for the $5,000,000, the Company secured, also, any deficiency that might ultimately exist between the accumulations of the sinking fund and the sum which the Company had actually received from the City, that is to say, $4,500,000. This was done by the following clause of the mortgage.

"Provided, nevertheless, and it is the true intent and meaning of the parties to these presents, that if the Baltimore and Ohio Rail Road Company do and shall pay to the Register (of the city) aforesaid the principal sum of five millions of dollars, issued under the provisions of said ordinance, (the ordinance of the City authorizing the transaction) less the amount of the sinking fund provided for therein, and its accumulations mentioned in the third section of said ordinance, at least one month ("once a month" in the record by a clerical error) before the day on which the certificates or bonds, directed by said ordinance to be issued, shall become redeemable, and shall also pay to the said Register interest, at the rate of six per cent. per annum, on the whole amount of said certificates or bonds issued, quarterly, and in advance, at least ten days previous to the first days of the several months mentioned in said ordinance, * * * * which said payment shall commence to be made in advance of the first payments of interest which shall be required to be made by the Mayor and City Council of Baltimore on said certificates or bonds, and shall continue to be made as aforesaid until the repayment by the said Company to the said Mayor and City Council of Baltimore of the principal sums of money which shall or may be issued as aforesaid * * then these presents shall be null and void," &c.

In pursuance of their agreement to this effect,—which was fully authorized by the Legislature of the State of Maryland and the City of Baltimore set forth and referred to in the record,—the Rail Road Company, as admitted, (page 8 of record) have, since the issue of the certificates, paid regularly to the Register of the City the interest on the whole $5,000,000, until the 1st July, 1863.

And the Company would have continued to pay the whole amount of the interest upon the whole amount of the certificates up to the present time, but for the intervention of the Commissioner of Internal Revenue of the United States, who insisted

that the Company must pay to *him* a portion of such interest, being the three per cent. tax imposed, according to his construction, by the Act of Congress, approved July 1st, 1862, entitled an "Act to provide internal revenue to support the Government to pay interest on the public debt and for other purposes."

When the Commissioner of Internal Revenue was about to take compulsory measures to enforce his claim, the Company paid the tax, and when the time for paying the interest to the City arrived, deducted it from the amount, being naturally unwilling to pay it twice.

Under the impression that the Commissioner was wrong in the construction of the Act of Congress in this particular, the City sued the Company in the State Court,—a *certiorari* was obtained from the Circuit Court of the United States, which at the trial of the case, gave (Giles, District Judge,) the following instruction to the jury:

"That upon the facts in this case, and upon the true construction of the Act of Congress to provide internal revenue, &c., approved July 1, 1862, the defendant (the Rail Road Company) was bound to pay to the United States the tax of three per cent. of the amount of interest due to the City on the mortgage which had been offered in evidence, and that if it has made such payment, (which was a fact not denied,) it is proper to deduct it from the interest payable under the said mortgage to the City."

The finding of the jury being in accordance with this instruction, the present appeal was taken—and this Court is now to decide, virtually, whether the mortgage given by the Company to the Mayor and City Council guaranteed to the latter the payment of the full amount of the interest, no matter what tax might be assessed and collected by the United States.

And this question is to be preceded by the enquiry, whether the mortgage which obliged the Company to pay the interest above referred to, came within any category of the Act of 1862, imposing a tax of three per cent. on the dividends and interest.

If the Rail Road Company had issued its own bonds, it would have had the right, unquestionably, to retain the three per cent. from the holders as they came to receive their interest.

But this is not a bond or certificate of indebtedness issued by the Company. It is a mortgage to secure certain payments of principal and interest of bonds issued by the Mayor and City Council.

Still the transaction, on its face, explains itself. The Company is made the payer of the principal. It is the payer also of the interest. The City officials have issued, for the Company's benefit, obligations to pay principal and interest. Where would have been the difference, in morals or equity, between this bond and the Company's bond, had the Company and not the City issued the obligations?

Suppose, for illustration, the Company had issued its own bonds, and, with the authority from the Legislature, which prescribed no form in which the aid authorized should be given, had guaranteed the bonds either by endorsement on the back in the usual way, or by a mortgage. In this case the bond would have been the Company's bond, falling within the exact terms of the Act, and no one would have denied the Company's right to withhold the tax from the bond holder.

So that we come to this result, that the City and the Company, if the Appellants are right, with the Act of Congress before them, and seeking to evade its provisions, could have done so by agreeing that the City would issue *its* bonds and the Company guarantee them—so as to bring the case within any exceptions that might exist in favor of municipal corporations—although every circumstance connected with the transaction, shewed that the Company and not the City was the party benefitted by the transaction, and should therefore be made to pay the tax as a part of the consideration for the advantage which it derived.

Still there is no doubt that a law may be so inaccurately worded as but partially to accomplish its object. Is this the case with the Act of Congress in question?

The words now to be considered are to be found in the 81st section of the Act of 1862, and are as follows:

"Any person or persons owning or possessing, or having the care or management of any Rail Road Company or Rail Road Corporation, being indebted for any sum or sums of money for which bonds *or other evidences of indebtedness* have been issued, * * * upon which interest is or shall be stipulated to be paid, * * are hereby authorized and required to deduct and

withhold from all payments made to any person, or persons, or party, * * on account of any interest, or coupons, or dividends payable as aforesaid, the said duty or sum of three per centum; and the duties deducted as aforesaid, and ratified by the President or other proper officer of said Company or Corporation, shall be a receipt and discharge according to the amount thereof of said Rail Road Companies or Rail Road Corporations, and the owners, possessors, and agents thereof, on dividends and on bonds or other evidences of their indebtedness, upon which interest or coupons are payable, holden by any person or party whatsoever."

The Commissioner of Internal Revenue insisted that the words "evidences of indebtedness" covered the case—and regarding the mortgage as such an evidence, he insisted on the collection of the tax.

Can there be any doubt on the subject? Is the instrument not the evidence of the obligation of the Company to pay a debt contracted for its benefit? In form, and in fact, the mortgage meets the full meaning of the words used in this section of the Act.

There remains the other question—does the mortgage amount to an obligation on the part of the Company to pay the whole amount of the interest irrespective of the tax?

Test this. Suppose the Company's own Bonds had been issued, we have seen the holder could have claimed no right to his interest clear of the tax. Wherein lies the difference?

At the time of the transaction, 1854, the state of things which led to the law of 1862, was not anticipated · A thousand relations, all affected by that law, were entered into. This was one of them. Each of the parties took the risks of the future. The City agreed to pay the holder of its bonds the principal and the interest. The Company agreed to pay the interest provided for in its mortgage. If the City appropriated this money to the payment of its own obligations, well. But suppose it had not done so—would that have affected the Company? not at all. It might have had a remedy in equity, looking to its interest in the sinking fund, and that would have been all.

But, says the City, I have to pay interest to my bond holders, and cannot deduct the three per cent. The reply is, that is your misfortune. It is to be regretted that Congress has not

legislated for your protection—that the Act of 1862, if such be the fact, does not affect you. Go to Congress. Do not insist that the Company shall relieve you from your liability, or furnish you the means of meeting it. It agreed to pay six per cent. The United States stops three per cent. of the amount on its way to you. Ask the United States to authorize you to deduct from your bond holders what the Rail Road Company have deducted from you. The bond holders cannot complain. There is no reason why these particular bonds should be exempt from a taxation to which all other bonds are subject. Congress is constantly making omissions and curing them. But Congress must help you, not the Rail Road Company.

This is the argument, which was, very probably, in the mind of the Commissioner of Internal Revenue, when he threatened distress if the Rail Road Company did not pay the tax. It seems to be a sound one.

It is insisted, therefore, that the mortgage given by the Rail Road Company comes within the category of evidences of debt of the Act of July 1st, 1862. And again, that, having paid the tax to the United States, the City Council have no right to insist on the payment in full, and without regard to it, of the interest due under the mortgage of 1854.

JNO. H. B. LATROBE,
For Appellees.